

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.111.5.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KIERAN HARDY,

Cross-Complainant and Appellant,

v.

JONATHAN PAUL EYEWEAR, LTD.,  
LLP,

Cross-Defendant and Respondent.

2d Civil No. B192841  
(Super. Ct. No. SC 039583)  
(Ventura County)

Kieran Hardy appeals from a judgment of dismissal entered after the trial court struck his third amended cross-complaint against Jonathan Paul Eyewear, Ltd., LLP as a SLAPP suit (strategic lawsuit against public participation). (Code Civ. Proc., § 425.16.)<sup>1</sup> We affirm and conclude that the libel action is barred by the fair reporting privilege. (Civ. Code, § 47, subd. (d)(1); *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 240-242.)

---

<sup>1</sup> Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

### *Facts and Procedural History*

Fitovers Eyewear USA Pty, Limited (Fitovers), a California corporation, makes and sells sunglasses that fit over prescription eyeglasses. Fitovers is owned and managed by Paul Stables.

Between 1997 and May 2001, appellant Hardy worked for Fitovers as Director of U.S. Operations. While employed at Fitovers, appellant hired Karen Zappia and promoted her to national sales manager.

In 2001, Stables discovered that company property was missing and accused appellant of providing false financial information to conceal company losses. Appellant resigned and became general manager of a competitor, Live Eyewear.

Zappia was asked to leave Fitovers and did so. She filed two actions against Stables and Fitovers. In the first action, she was awarded \$38,574.68 damages for unpaid vacation time and waiting time penalties. (Lab. Code, § 203; Ventura County Sup Ct., Case No. 033011.) In her second action for breach of contract, stalking, and infliction of emotional distress, the jury found for Fitovers and Stables. (Ventura County Sup. Ct., Case No. 033066.) Fitovers was awarded \$7,748.56 conversion damages on a cross-complaint.

In May of 2004, Fitovers sued appellant for breach of contract, breach of fiduciary duty, and conversion. Appellant filed a cross-complaint alleging that Fitovers and Stables fraudulently breached an agreement to give him an ownership interest in the business.

In February 2005, appellant learned that several optical trade publications had received an anonymous e-mail entitled: "Fitovers Eyewear sues Kieran Hardy of Live Eyewear." The e-mail stated that Fitovers was suing appellant for fraud and that Fitovers had sued Zappia in a prior action.

The e-mail stated in pertinent part: "In that case against Karen Zappia, Ms Zappia was found guilty of conversion and order[ed] to pay back \$17K + expenses in money she had embezzled from Fitovers Eyewear. Criminal proceedings against Ms Zappia are being currently reviewed. [¶] Depending on the outcome of the upcoming [sic] case against Mr Hardy, Fitovers Eyewear has stated that should criminal proceedings eventuate

against Karen Zappia and Kieran Hardy, that the most severe penalty including incarceration be handed-down. [¶] It should also be know[n] that during their employment with Fitovers Eyewear that Kieran Hardy and Karen Zappia, were also involved in a romantic relationship."

Appellant was granted leave to file a second amended cross-complaint adding a sixth cause of action for libel and a seventh cause of action for public disclosure of private facts. The second amended cross-complaint stated that Stables sent the e-mail and that it originated from an Internet IP address used by Stables. Appellant added Jonathan Paul Eyewear Ltd. LLP (JP Eyewear), an Australian corporation, as a cross-defendant based on the theory that JP Eyewear was "related to Fitovers" and owned by Stables. The trial court sustained, without leave to amend, a demurrer to the seventh cause of action for public disclosure of private facts.

After appellant filed a third amended cross-complaint, JP Eyewear brought a special motion to strike the sixth cause of action for libel. (§ 425.16.) The trial court granted the motion on the ground that the action was barred by the Civil Code section 47, subdivision (d)(1), which provides that fair and true reports to a public journal about a judicial proceeding are privileged.<sup>2</sup>

#### *The anti-SLAPP Statute*

Analysis of a section 425.16 motion requires a two-step process. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To prevail on the anti-SLAPP motion, JP Eyewear must make a threshold showing that the challenged cause of action arises from an act in furtherance of its right of petition or free speech. If JP Eyewear makes the required showing, the burden shifts to appellant to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).)<sup>3</sup> "These determinations are legal questions which we

---

<sup>2</sup> Civil Code section 47 states in pertinent part: "A privileged publication or broadcast is one made: . . . [¶] (d)(1) By a fair and true report in, or a communication to, a public journal of . . . a judicial . . . proceeding . . . ."

<sup>3</sup> Section 425.16, subdivision (b)(1) states in pertinent part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or

review de novo. [Citation.]" (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.)

Here the e-mail is a communication made in connection with a judicial proceeding. The trial court did not err in finding that the third amended cross-complaint comes within the ambit of the anti-SLAPP statute. (See e.g., *Sipple v. Foundation for Nat. Progress*, *supra*, 71 Cal.App.4th at p. 240.)

#### *Litigation Privilege*

Appellant claims that he will prevail on the action because the e-mail is not protected speech covered by the litigation privilege. (Civ. Code, § 47, subd. (b).) The trial court did not rule on this privilege, and for good reason. The litigation privilege applies to statements made in a "judicial proceeding" but not out-of-court statements to persons unconnected to the proceeding. (*Begier v. Strom* (1996) 46 Cal.App.4th 877, 882.) For the litigation privilege to apply, there must be a functional connection between the e-mail and the pending lawsuit. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146; *Rodriguez v. Panayiotou* (9th Cir. 2002) 314 F.3d 979, 989.)

"[T]he *communicative act* — be it a document filed with the court, a letter between counsel or an oral statement - must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation . . . . The litigation privilege exists so that persons who have been harmed or have other grievances calling for redress through the judicial processes can and will use the

---

free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e) defines " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " to include (2) any written or oral statement or writing may in connection with an issue under consideration or review by a . . . judicial body . . . ."

courts, rather than self-help, to obtain relief. The privilege thus affords its extraordinary protection to the uninhibited airing, discussion and resolution of disputes *in, and only in, judicial or quasi-judicial arenas*. Public mudslinging, while a less physically destructive form of self-help than a public brawl, is nevertheless one of the kinds of unregulated and harmful feuding that courts and their processes exist to prevent. It would be counterproductive to afford to it the same protections which section 47, subdivision (b) gives to court processes." (*Rothman v. Jackson, supra*, 49 Cal.App.4th at p. 1146.)

#### *Fair Reporting Privilege*

The trial court ruled that the libel action was barred by the fair reporting privilege, an absolute privilege that is broader than the litigation privilege. (See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts § 585, p. 863; *Sipple v. Foundation for Nat. Progress, supra*, 71 Cal.App.4th at pp. 240-242.) It did not err. "Civil Code section 47, subdivision (d) confers an absolute privilege on any fair and true report in, or a communication to, a public journal of a judicial proceeding, or anything said in the course thereof." (*Id.*, at p. 240.)

The third amended complaint states that appellant was defamed by an "e-mail press release" that was sent to "optical industry trade publications." Based on the facts alleged, it is a communication to a public journal about a judicial proceeding.

Appellant, however, argues that the fair reporting privilege only applies to news media defendants who print the communication in a public journal. Before 1996, that was the law. In *Shahvar v. Superior Court* (1994) 25 Cal.App.4th 653, an attorney faxed a civil complaint to a newspaper which published an article summarizing the allegations in the complaint. The Court of Appeal held that the attorney's conduct was not privileged because the "facsimile communication of the complaint to the newspaper was nothing more than a republication of the complaint's allegations to an unrelated person." (*Id.*, at p. 659.) The court held that the reporting privilege protected statements printed in public journals, but not statements to public journals. (*Id.*, at p. 663.)

The Legislature, in response to *Shahvar v. Superior Court*, amended Civil Code section 47, subdivision (d) to provide a privilege for "a fair and true report in, *or a communication to*, a public journal of . . . a judicial . . . proceeding. . . ." (Stats 1996, c. 1055.) It declared that: "In amending Section 47 of the Civil Code by this act, it is the intent of the Legislature to abrogate the decision in *Shahvar v. Superior Court* (1994) 225 Cal.App.4th 653, to preserve the scarce resources of California's courts, to avoid using the courts for satellite litigation, and to increase public participation in the political, legislative, and judicial processes." (6 West's Ann. Cal. Codes (2006 Supp.) Civ. Code § 47, Historical and Statutory Notes, 1996 Legislation at p. 69.)

In *Microsoft Corp. v. Yokohama Telecom Corp.* (CD Cal. 1998) 993 F.Supp. 782, Microsoft paid a newspaper to publish an article that a competitor was being sued for copyright and trademark infringement. The article stated that the competitor allegedly distributed counterfeit products to undercover investigators. Citing Civil Code section 47, subdivision (d), the federal court held that the paid announcement was privileged because it was "a 'report in' a public journal. Microsoft bought space in the *World Daily* to print its announcement so the public would see it. *World Daily* acted as the vehicle for Microsoft's 'report in' a public journal. The statute's wording does not require that the journal be the author of the report." (*Microsoft Corp. v. Yokohama Telecom Corp.*, *supra*, 993 F.Supp. at p. 785. Fn. omitted.)

The same reporting privilege applies here. Civil Code section 47, subdivision (d)(1) protects fair and true reports by nonmedia defendants to a public journal. (See *Rothman v. Jackson*, *supra*, 49 Cal.App.4th at p. 1144, fn. 3; Flahavan & Rea, Cal. Practice Guide, Personal Injury (Rutter 2006) [¶] 2:972.2, p. 2-310.13.) Assuming that JP Eyewear transmitted the e-mail to the optical trade journals, it is clearly a "communication to" a public journal. Civil Code section 47, subdivision (d)(1) "does not distinguish between unpaid news stories and paid announcements. [¶] The broad effect of Cal. Civ. Code § 47(d)'s plain language is to accord an absolute privilege . . . ." (*Microsoft Corp. v. Yokohama Telecom Corp.*, *supra*, 993 F.Supp. at p. 785.)

### *False Statements*

Appellant argues that the fair reporting privilege does not apply because the e-mail contains false and inaccurate statements. A defendant, however, is not required " 'to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case.' [Citation.]" (*Sipple v. Foundation for Nat. Progress, supra*, 71 Cal.App.4th at p. 244.)

The e-mail states that Fitovers is suing for fraud. Appellant contends that the Fitovers action is not for "fraud" even though the complaint alleges damages for breach of fiduciary and conversion. The Fitover complaint further alleges that appellant helped Zappia falsify a bogus written employment and furnished false financial information to cover up business losses. The trial court reasonably concluded that the e-mail was a fair summary of the Fitovers complaint. (*Ibid.*; *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560.) "In the context of judicial proceedings, case law is clear that reports which comprise a *history* of the proceeding come within the privilege, as do statements made outside the courtroom . . ." concerning the background of the case. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1050.)

Appellant argues that the e-mail is libelous because it states that Fitovers "aims to recover \$500,000." The complaint prays for \$130,000 compensatory damages plus punitive damages. The trial court correctly found that the fair report privilege does not require that the communication be 100 percent accurate. " ' "[A] slight inaccuracy in the details will not present a judgment for the defendant if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently. . . . " ' [Citation.]" (*Sipple v. Foundation For Nat. Progress, supra*, 71 Cal.App.4th at p. 244.)

Appellant complains that the e-mail falsely states that "[c]riminal proceedings against Ms. Zappia are being currently reviewed." Appellant makes no showing that the statement is false, but assuming it is, it does not defame appellant.

The e-mail states that "depending on the outcome of the upcoming case against Mr. Hardy, Fitovers Eyewear has stated that should criminal proceedings eventuate against Karen Zappia and Kieran Hardy, that the most severe penalty including incarceration be handed down." The statement is an opinion about future actions that may be taken by a prosecutor. Statements of opinion are protected speech and do not support a cause an action for libel or trade libel. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010-1011;.)

Appellant argues that the e-mail falsely states that appellant and Zappia abused a position of trust, that appellant conspired with Zappia to defraud Fitovers, and that appellant withheld financial information from Fitovers. The trial court did not err in finding that the e-mail was a fair statement describing the gist and substance of the Fitovers action. " '[T]he publication in question must be considered in its entirety; [i]t may not be divided into segments and each portion treated as a separate unit. [Citation.] It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader [citations] . . . [Citation.] ' ' ' (*Baker v. Los Angeles Herald Examiner, supra*, 42 Cal.3d at p. 261.)

Appellant finally argues that the e-mail is defamatory because it states that appellant and Zappia were involved in a romantic relationship. But truth is a defense to a defamation action. (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382.) Zappia testified in the prior action that she had a romantic relationship with appellant.

#### *Commercial Speech – The Section 425.17 Exemption*

Relying on section 425.17, appellant argues that an anti-SLAPP motion may not be granted where the defamation involves commercial speech. Section 425.17 carves out specific exceptions to the anti-SLAPP statute and provides that section 425.16 does not apply to claims against a person primarily engaged in the business of selling goods where (1) the statement consists of representations of fact about the person's or competitor's business operation, goods, or services, and (2) the statement occurred in connection with a



commercial transaction: and (3) the intended audience is an actual or potential customer or a person likely to influence an actual or potential customer. (§ 425.17, subd. (c); Weil & Brown, Cal. Practice Guide (Rutter 2006) Civil Procedure Before Trial ¶ 7:212.10, p. 7-74.)

Here the alleged libel does not concern appellant's business, goods or services, nor was the e-mail sent in connection with a commercial transaction to an actual or potential customer. (See e.g., *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841 [settlement statements not made in course of delivering goods or services].)

The third amended complaint alleges that the "e-mail press release" was sent to optical industry trade publications. Appellant makes no showing that EP Eyewear transmitted the e-mail or that it is probable that he will prevail on the libel action against EP Eyewear.<sup>4</sup>

The judgment (order granting anti-SLAPP motion) is affirmed. JP Eyewear is awarded attorney's fees and costs on appeal. (§ 425.16, subd. (c); *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1119.)

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

---

<sup>4</sup> Appellant, in his opening brief, states that the litigation privilege does not apply because "JP Eyewear was not a litigant in this action in February 2005 when the email was sent." The argument estops appellant from claiming that JP Eyewear transmitted the e-mail.

Thomas J. Hutchins, Judge

Superior Court County of Ventura

---

Grey & Grey, David M. Grey; Esner, Chang & Ellis, Gregory R. Ellis and  
Stuart B. Esner, for Appellant.

Thomas P. Gmelich and Arnold S. Levine; Bradley & Gmelich, for  
Respondent.